BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILSON D. RENYER Claimant	)	
VS.	)	
	)	Docket No. 224,482
GOODYEAR TIRE & RUBBER COMPANY Respondent	)	
AND	)	
TRAVELERS INSURANCE COMPANY Insurance Carrier	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Worker's Compensation Fund (Fund) requested review of the March 14, 2003 Award of Bryce D. Benedict. The Board heard oral argument on September 4, 2003.

APPEARANCES

James B. Biggs of Topeka, Kansas appeared for Kansas Worker's Compensation Fund. Patrick Salisbury of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award

ISSUES

The Kansas Workers Compensation Fund (Fund) appeals the March 14, 2003 Award of Administrative Law Judge Bryce D. Benedict (ALJ) ordering the Fund, pursuant

to K.S.A. 44-569(a), to reimburse the respondent the money it paid to claimant to settle his claim.[1] The ALJ found the evidence failed to establish "that it is more probable than not that the Claimant suffered any series of accidents after 1993." (Award, at 2).

The Fund maintains the ALJ erred and argues the evidence shows claimant suffered a series of microtraumas from July 27, 1993 and continuing until his last day of work in 1995. As a result, the Fund argues that claimant's series of intervening accidents culminated in an accident date of December, 1995, his last date of work under Kansas law. Because that date falls after July 1, 1994, the Fund contends it has no liability to respondent under K.S.A. 1999 Supp. 44-566a(e)(1).

Conversely, respondent maintains the uncontroverted medical testimony justifies the ALJ's decision and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Claimant has been employed by respondent for over 30 years. During his tenure, he had undergone surgery in 1969 and again in 1979 for work-related injuries to his low back at the L4-5 level. In 1984, he sustained yet another injury and was referred to Dr. Craig Yorke for treatment. Following a third surgery, again to the L4-L5 level, he was released to return to work. Claimant returned to his same position as pipe fitter but was assigned to work on a bench. The work would be brought to claimant and he would perform his duties at the bench, rather than on site in the plant.

On July 27, 1993, claimant lifted a 25 pound object and experienced increased pain complaints for which he requested and received treatment from Dr. Craig Yorke. Conservative treatment was prescribed. Claimant continued performing his regular duties although he would have periods when the pain in his low back and legs, primarily the left, would wax and wane. In 1995, claimant's complaints increased and he returned to see Dr. Yorke. After some internal discussion, it was determined claimant was unable to continue his job with respondent and claimant was granted disability retirement benefits in December of 1995.

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[1] Claimant settled his claim and therefore did not participate in this proceeding.

In June of 1997, claimant resolved his workers compensation claim stemming from the July 27, 1993 accident. In typical practice, the Fund was impled just prior to the settlement hearing although it did not appear. Claimant received $56,456.00 in permanent partial impairment and $2,725.75 in hospital and medical expenses were paid on his behalf. This total sum of $59,181.75 was sought in reimbursement pursuant to K.S.A. 44-566a(e)(1)

Whether respondent is entitled to reimbursement is governed by K.S.A. 44-566a(e)(1) which provides "[t]he workers compensation fund shall be liable for . . . [p]ayment of awards to handicapped employees in accordance with the provisions of K.S.A. 44-569 and amendments thereto for claims arising prior to July 1, 1994". In this instance, there is no dispute that claimant was handicapped and that the documentation was on file with the Division pursuant to K.S.A. 44-567(b). However, the parties' dispute stems from the fundamental question of date of accident. If the date of accident is found to be before July 1, 1994, then the ALJ's determination must be affirmed. Conversely, if the accident is after July 1, 1994, then reimbursement is not available.

The Fund correctly asserts that Kansas law recognizes the unique nature of repetitive injuries and the need to arbitrarily select the "last day to work" as the accident date for purposes of assigning liability. See e.g. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). However, when the evidence is read as a whole, the ALJ's determination that there was no series of microtraumas or repetitive injuries is justified by the medical testimony.

Dr. Craig Yorke, a neurosurgeon, treated claimant off and on from 1984 to 1995. He performed surgery on claimant's back in 1984 and continued to treat him as claimant's condition warranted. According to Dr. Yorke, claimant's July 27, 1993 lifting accident created an additional chronic strain but that he could not say that "his [claimant's] structural anatomy at L4-5 was visibly changed." (Yorke Depo. at 17-18)

Claimant was also seen and treated by Dr. Phillip L. Baker, a board certified orthopaedic physician, as far back as 1977. According to Dr. Baker, the lifting of a 25 pound object is simply not heavy enough to be the sole cause of claimant's problems following the July 27, 1993 accident. Put simply, the symptoms that developed in late July 1993 would not have occurred but for the preexisting disease in claimant's lumbar spine particularly the L4-L5 level and into the leg.

Dr. Baker went on to testify that the previous surgeries at the L4-L5 level weakened or lowered claimant's defense to the subsequent July 27, 1993 injury. While Dr. Baker conceded that the medical records show claimant was continuing to work for respondent from July 27, 1993 until the time he retired in 1995 and that he continued to suffer from additional symptomatology, Dr. Baker nonetheless stated that claimant's "back is worn out and you'd expect this in the natural course of natural disease the way I look at it." (Baker Depo. at 24)

While there is some suggestion in the record that claimant's continued working for respondent may have given rise to a series of microtraumas, the greater weight of the evidence establishes that it is more likely than not that claimant had an acute onset of symptoms on July 27, 1993 after lifting a 25 pound object while working for respondent. Further, the medical testimony makes it more probable than not that claimant's medical retirement was necessitated not by a series of injuries culminating in 1995 but due to a natural progression of the 1993 accident as well as the prior surgeries which had rendered him a "handicapped" employee pursuant to the principles set forth in K.S.A. 44-566, K.S.A. 44-567 and K.S.A. 44-569. Accordingly, the ALJ's finding that the Fund is to reimburse respondent $59,181.75 is well reasoned and justified by the medical evidence.

Although the Fund primarily relies upon its "date of accident" theory, during oral argument the Fund's counsel asserted that the settlement entered into by respondent and the claimant was unreasonable. The Fund suggests that the large settlement entered into with claimant was nothing more than a "buy out" of the potential work-disability claim that claimant might have asserted.

The Board has reviewed the entire record in light of the Fund's argument and concludes that the facts of this case support the finding that the settlement entered into by the respondent with the claimant was reasonable. Claimant had sustained multiple work-related accidents over the years, all while working for respondent, and had collected workers compensation benefits. Although claimant continued to work for respondent in an accommodated job for a time after the July 27, 1993 lifting accident, eventually Dr. Yorke imposed restrictions in 1995 that could or would no longer be honored. As a result, there was not only a functional impairment associated with the claim but the probability of a much higher work disability.

The claim that arose out of that accident was eventually settled on June 3, 1997 and all issues were resolved in exchange for the monetary payment. Thus, respondent was able to extinguish a significant risk that it might ultimately be held responsible for vocational rehabilitation and additional medical treatment in addition to permanent partial general disability benefits based upon work disability. There is nothing within this factual scenario that suggests the settlement with claimant was anything other than the reasonable result of negotiation and advocacy. Therefore, under these facts and circumstances the Board finds that respondent's settlement with claimant is reasonable.

The Fund also alleges at oral argument that claimant did not lose any time from his job following the July 27, 1993 accident and as such, he is entitled to no permanency under *Boucher v. Peerless Products, Inc.* 21 Kan. App. 2d 977, 911 P.2d 198 (1996). This argument was not presented to the ALJ and therefore, the Board need not address it. See *Adam v. Dave Cook d.b.a. Cook Construction and Clifton Homes, Inc.*, No. 216,254 1998 WL 51311 (Kan. WCAB January 27, 1998).

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge dated March 14, 2003 is hereby affirmed.
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IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick Salsbury, Attorney for Respondent
James Biggs, Attorney for Workers Compensation Fund
Bryce D. Benedict , Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director